United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

Corrected Copy

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76-7195

United States Court of Appeals
For the Second Circuit

DIMITRIOS GARIS,

Plaintiff-Appellant,

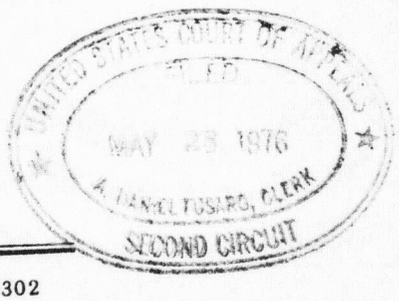
v.

COMPANIA MARITIMA SAN BASILIO, S.A.

Defendant-Appellee.

Appellant's Appendix

LEBOVICI & SAFIR
Attorneys for Plaintiff-Appellant
15 Maiden Lane
New York, N.Y. 10038



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INDEX TO APPENDIX

	Page
Docket Entries	A
Complaint	1a
Defendant's Notice of Motion for Summary Judgment	9a
Defendant's Supporting Affidavit of Lawrence J. Mahoney	10a
Defendant's Southern District General Rules 9(g) Statement	16a
Affidavit of Herbert Lebovici Submitted In opposition to defendant's motion . . .	18a
Decision of Greek Court of First Instance in case of Lambiris v. Neptune Maritime Co. incorporated to Opposing Affidavit.	32a
Decision of Greek Appellate Court Affirming Decision of Court of First Instance in case of Lambiris v. Neptune Maritime Co.	39a
Newspaper Clipping re Sale of Marchessini Lines	62a
Plaintiff's Letter to Judge Griesa dated October 31, 1975	63a
Plaintiff's letter to Judge Griesa dated November 7, 1975	70a
Defendant's Memorandum of Law in Support of Motion for Summary Judgment	76a
Opinion of Judge Griesa Granting Summary Judgment	81a
Plaintiff's Notice of Appeal	86a

CIVIL DOCKET

UNITED STATES DISTRICT COURT 74 CIV. 5527

DIMITRIOS GARIS

vs.

COMPANIA MARITIMA SAN BASILIO, S.A. JUDGE GRIESA

For Plaintiff:
LEBOVICI & SAFIR
15 Maiden Lane
NYC 10038
233-6165

For Defendant:
DOUGHERTY, RYAN, MAHONEY, PELLEGRINO & GIUFFRA
575 Fifth Ave., NYC 10036

Dec. 17, 1974

J.S. 6 mailed

Basis of Action: Seamen Action - Per Inj. due to negl.
$750,000.00

Dec. 17, 1974 - Filed complaint & Issued Summons.

Jan. 6, 1975 - Filed summons & Marshal's return. Served:
Compagnia Maritima BY: G. Gedenk 12-26-74

May 28, 1975 - Filed Stip & Order adjourning to 6/17/75
defts. motions to dismiss , the complt. GRIESA, J.

June 17, 1975 - Filed pltffs affdvt. in opposition
to defts motion to dismiss.

June 17, 1975 - Filed Pltffs memo of law in
opposition to motion.

Oct. 24, 1975 - Pre Trial Conference held by J. Griesa.

March 12, 1976 - Filed Opinion No. 44051 for the reasons
stated, the action is dismissed. GRIESA, J.

April 9, 1976 - Filed pltff's notice of appeal to USCA from the decision and order dated 3/12/76, dismissing the action. Copy mailed to Dougherty, Ryan, Mahoney & Pellegrino, Ent. 4/12/76.

April 14, 1976 - Filed defendant's notice of motion for summary judgment. Ret. 2/7/75.

April 14, 1976 - Filed defendant's memorandum of law in support of motion.

April 14, 1976 - Filed defendant's reply affidavit to opposing affidavit of plaintiff.

April 14, 1976 - Filed defendant's statement pursuant to General Rule 9 (g).

April 14, 1976 - Filed plaintiff's letter dated October 31, 1975 to Judge Griesa.

April 14, 1976 - Filed plaintiff's letter dated November 7, 1975 to Judge Griesa.

COMPLAINT

ACTION UNDER SPECIAL RULE FOR SEAMEN
TO SUE WITHOUT PREPAYMENT OF FEES, ETC.

The plaintiff complaining of the defendant respectfully shows to this court and alleges:

FIRST: That at all the times herein the defendant was and still is a foreign corporation organized and existing pursuant to the laws of the Republic of Panama.

SECOND: Upon information and belief that at all the times herein the defendant had a principal office for the regular transaction of and was doing business in the Borough of Manhattan, City and State of New York.

THIRD: That at all the times herein the SS EURYTAN was and still is a merchant vessel and at all the times herein flew the flag of the Republic of Greece.

FOURTH: Upon information and belief that the said flag was at all the times herein a flag of convenience having no bona fide, social, economic or political ties with the Republic of Greece.

FIFTH: Upon information and belief that during all the times herein the defendant engaged in the operation and control of the EURYTAN in the operation of said vessel in foreign commerce of the United States.

SIXTH: Upon information and belief that at all the times herein a majority of the stock of the defendant corporation was owned and/or controlled by citizens and/or permanent residents of the United States.

SEVENTH: Upon information and belief that at all the times herein the said EURYTAN was operated from the principal office of the defendant in the Borough of Manhattan, City and State of New York.

EIGHTH: Upon information and belief that at all the times herein the said defendant was a commercial domiciliary of the Borough of Manhattan, City and State of New York.

NINTH: Upon information and belief that at all the times herein the principal business of the EURYTAN and the principal contacts of the business thereof and of the defendant was with ports, places and transactions of the United States.

TENTH: That the contacts of the transaction herein are "substantial" within the meaning of the applicable law as set forth in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 and Bartholomew v. Universe Tankships Inc., 263 F.2d 437 and

by reason thereof the plaintiff is entitled to prosecute his claim pursuant to the provisions of an Act of Congress known as the Merchant Marine Act of June 5, 1920, Section 533 Chapter 250, 41 Stat. 1007, as amended and commonly known as the Jones Act.

ELEVENTH: That on or about the 24th day of May, 1965, the plaintiff was duly engaged by the defendant, its servants or employees thereof to serve as a seaman, to wit, as a fireman aboard the EURYTAN under agreement to be paid regular monthly wages and found plus overtime.

TWELFTH: That the plaintiff continued to serve aboard the vessel until on or about the 18th day of September 1965, when he was discharged at San Pedro, California in order to receive medical treatment for injuries suffered by him as more fully referred to hereinafter.

THIRTEENTH: That on or about the 17th day of September 1965 while the vessel was being operated by the defendant on navigable waters, and while in the performance of orders previously given, by reason of the negligence of the said defendant, its agents, servants and/or employees or one or more of them, and/or because of the unseaworthiness of the said EURYTAN the plaintiff was caused to be severely injured and disabled.

FOURTEENTH: That heretofore, in January of 1966 the plaintiff instituted an action in the United States District Court for the Southern District of New York against the defendant herein grounded substantially on the same injury and the same occurrence for which relief is sought herein through other counsel.

FIFTEENTH: That in the course of such action the defendant moved for summary judgment requesting that the court decline the jurisdiction of the court pursuant to the doctrine of forum non conveniens and requested that the plaintiff be relegated to an action in the courts of Greece.

SIXTEENTH: The said application was submitted to then District Judge Edward C. McLean who non-suited the plaintiff by granting the application to decline jurisdiction of the said lawsuit; that the said dismissal was not a dismissal on the merits and stated that said dismissal was without prejudice to the institution of an action in Greece.

SEVENTEENTH: That the plaintiff thereupon instituted an action for the same matters and things referred to in the complaint in the action theretofore commenced in the United States District Court in June of 1968 through different counsel than the one who had represented him in the previous Federal action, that such action in the Supreme Court of the

State of New York was in all respects timely and brought within the time limited by the Jones Act for the bringing of such action.

EIGHTEENTH: That in September of 1971, after the time limited for the bringing of a new action under the Jones Act had expired, the defendant moved for summary judgment on the ground of forum non conveniens in the new action brought in the Supreme Court of the State of New York and by order entered December 7, 1971, Justice Paul A. Fino again non suited the plaintiff by declining jurisdiction over the said complaint and dismissing the action against this defendant.

NINETEENTH: That thereafter the plaintiff appealed the decision of Justice Fino to the Appellate Division of the State of New York and the said order was affirmed by the Appellate Division of the State of New York, whereupon an application was duly made to the Court of Appeals of the State of New York for leave to appeal the order of Justice Fino and the Appellate Division to that court, and on July 14, 1974, leave to take such appeal to the Court of Appeals was denied by it.

TWENTIETH: That upon the said denial of relief in the Court of Appeals for the State of New York, an appeal was duly taken by the plaintiff to the Supreme Court of the United States which appeal is now pending in such court.

TWENTY-FIRST: Upon information and belief, the legal situation of the plaintiff with respect to these matters is such, that in the event the Supreme Court of the United States should confirm the order of the Supreme Court declining jurisdiction or if it should refuse to entertain the appeal of the plaintiff or grant certiorari herein, that in such event, the plaintiff is nonetheless entitled to reinstitute his complaint in this court, and by virtue of the law applicable, the new action so instituted is timely brought.

TWENTY-SECOND: That in the event the Supreme Court of the United States reverses or modifies the order of the Supreme Court declining jurisdiction, that in such event the action herein will be discontinued, and it will be unnecessary to further prosecute the action now instituted herewith; that in the event no relief is granted by the Supreme Court of the United States, it then becomes the intention of the plaintiff to prosecute the within action with all due diligence.

TWENTY-THIRD: That by reason of the foregoing, the plaintiff has been caused to be severely permanently

injured and damaged; has been caused to lose large sums of money that he otherwise would have earned in the pursuit of his vocation as a merchant seaman; has been caused to spend large sums of money to maintain himself ashore whereas board would normally have been provided to him by the vessel on which he was working; has been caused to spend large sums of money for medical care and attention and will be so caused to spend large sums of money in the future, and has otherwise been permanently damaged and will be caused to lose or spend large sums of money in the future that he otherwise would not have been caused to lose or spend.

TWENTY-FOURTH: That the plaintiff has been caused to suffer much agony, pain and mental suffering that he otherwise would not have been caused to suffer and will be so caused in the future and by reason of the failure of the defendant to provide appropriate medical care and attention that the plaintiff is and will be in need of.

TWENTY-FIFTH: That plaintiff cannot receive relief pursuant to the law of the United States in Greece or elsewhere, nor can he have in other jurisdiction the trial by jury granted by United States law.

TWENTY-SIXTH: That jurisdiction is asserted by virtue of the Jones Act and the General Maritime Law.

TWENTY-SEVENTH: That by reason of the premises plaintiff has been damaged in the sum of $750,000.

AS AND FOR A SECOND CAUSE OF ACTION
AGAINST THE DEFENDANT.

TWENTY-EIGHTH: Plaintiff repeats, reiterates and realleges with the same force and effect as those set forth at length herein paragraphs numbered FIRST through TWENTY-SEVENTH.

TWENTY-NINTH: Upon information and belief that by reason of the matters hereinbefore set forth the plaintiff is further entitled to recover against the defendant the damages sustained by him as aforesaid pursuant to the General Maritime Law.

WHEREFORE, plaintiff demands damages against the defendant in the amount of $750,000 together with interest, costs and disbursements as may be appropriate.

LEBOVICI & SAFIR
Attorneys for Plaintiff

By: Herbert Lebovici
A Member of the Firm

15 Maiden Lane
New York, N.Y. 10038
(212) BE 3-6165

PECHNER, SACKS, DORFMAN,
ROSEN & RICHARDSON
of Pennsylvania

Of Counsel

DEFENDANT'S NOTICE OF MOTION
FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE, that pursuant to Rule 56(a) and (c) and upon all the prior proceedings and upon the attached Affidavit of Lawrence J. Mahoney, the defendant herein, Compania Maritima San Basilio, S.A., will move this Court before the Honorable Thomas P. Griesa, United States District Judge, at 10 a.m. on February 7, 1975, in the Judge's chambers in the United States Courthouse, Foley Square, New York, New York or at such other time and place as the Court may determine for an Order granting defendant summary judgment and dismissing this action for res judicata, and for such other, further and additional relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that plaintiff is required to serve a copy of any answering Affidavit upon the defendant's attorneys at least five days before the return date of this motion.

Dated: New York, New York
January 22, 1975

Yours, etc.

DOUGHERTY, RYAN, MAHONEY, PELLEGRINO
& GIUFFRA
Attorneys for Defendant

By s/ Lawrence J. Mahoney

576 Fifth Avenue
New York, New Y'rk 10036

DEFENDANT'S SUPPORTING AFFIDAVIT
OF LAWRENCE J. MAHONEY

LAWRENCE J. MAHONEY, being duly sworn, deposes and states:

That he is an attorney at law and a member of the firm of Dougherty, Ryan, Mahoney, Pellegrino & Giuffra, attorneys for defendant, Compania Maritima San Basilio, S.A., and that this affidavit is submitted in support of the defendant's motion to dismiss this action on the ground of res judicata.

This action, which was filed on December 17, 1974, alleges that the plaintiff was injured aboard the defendant's vessel on September 17, 1965. This is an inexplicable attempt to revive a cause of action which has been previously dismissed by this Court, by the Court of Appeals for the Second Circuit and by the Supreme Court of New York County, in a decision which was affirmed by the Appellate Division, First Department. The plaintiff's motion for leave to appeal to the Court of Appeals for the State of New York has been denied; his appeal to the Supreme Court of the United States was dismissed for want of jurisdiction, and his petition for certiorari was denied.

On January 14, 1966, this plaintiff instituted an action in the United States District Court for the Southern District of New York against Compania Maritima San Basilio, S.A.

the defendant in this most recent action, under Admiralty, No. 66 AD 35. This libel contains substantially the same allegations as those made in the instant suit. The defendant brought on a motion for Summary Judgment, on the ground of forum non conveniens, and requested the Court to decline its discretionary jurisdiction and to relegate the action to the Courts of Greece.

This motion was submitted to the Honorable Edward C. McLean, District Court Judge, who directed that testimony be taken concerning the status of the parties. After consideration of the testimony, Judge McLean granted the motion and declined to take jurisdiction of the suit. The action was dismissed without prejudice to the institution of an action in Greece, in an opinion reported at 361 F. Supp. 917. As a condition to the dismissal, the defendant shipowner agreed to appear in any suit brought by Garis in a greek Court, and agreed to provide security.

Garis then appealed to the United States Court of Appeals, Second Circuit, which confirmed the dismissal in an opinion reported at 386 F. 2d 155. In this opinion, dated November 28, 1967, the Court of Appeals stated that the District Court had properly exercised its discretion in declining to accept jurisdiction of this suit.

Thereafter Garis instituted an action in the Supreme Court of the State of New York, County of New York by service of a Summons and Complaint on June 10, 1968. This suit named as defendants the shipowner, Compania Maritima San Basilio, S.A., and its agent, P. D. Marchessini & Co. (New York), Inc.

Following the taking of additional testimony, the defendants made a motion on August 11, 1971 to dismiss the action on the ground of forum non conveniens. This motion was granted by Mr. Justice Paul A. Fino of the Supreme Court, New York County in a decision dated October 13, 1971. As a condition for the dismissal Judge Fino directed that Compania Maritima San Basilio, S.A. provide security in the amount of $150,000 to secure appearance in any Greek action started by Garis. In accordance with this direction, defendant's counsel provided the plaintiff's attorney with a Guarantee dated October 12, 1973 assuring the appearance by Compania Maritima San Basilio, S.A. in any suit commenced by Garis in Greece. This Guarantee, which was accepted by Garis' attorney, further guaranteed that the shipowner would admit ownership, operation and control, that it would make no objection to the jurisdiction of the Greek Court and that it would waive any applicable Statute of Limitations.

Thereafter the plaintiff appealed to the Appellate Division, First Department, by a notice of appeal filed on January 3, 1972.

This appeal was argued on February 26, 1974, and on March 8, 1974 the Appellate Division, First Department, unanimously affirmed the decision of Mr. Justice Fino dismissing the action.

Garis' attorney thereupon made a motion for leave to appeal to the Court of Appeals of the State of New York. This appeal was denied without opinion by the Court of Appeals on July 14, 1974.

Thereafter Dimitrios Garis appealed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York, pursuant to 28 U.S.C.A. 1257(1). In the event that the direct appeal was found to be improvident, the appellant asked that the Supreme Court of the United States treat the appeal as an application for a writ of certiorari.

On December 16, 1974 the Supreme Court of the United States dismissed the appeal for want of jurisdiction and denied the petition for certiorari. A copy of that order is annexed hereto as Exhibit "A".

The issue of forum non conveniens has been determined by every Federal and State Court before which the matter has been heard. Therefore deponent respectfully requests that this latest action be dismissed as res judicata. As appears from the annexed Statement pursuant to Rule 9(g), there is no issue of fact regarding the prior holdings of the Courts which have dismissed this suit on the ground of forum non conveniens.

At a recent informal conference before Judge Thomas Griesa, the plaintiff's attorney took the position that the law has changed since the original dismissal of this action. He cited in particular Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, and Moncada v. Ekberg Steamship Inc. and Lemuria Shipping Corp., 491 F. 2d 470. It appeared to be the argument of plaintiff's counsel that these cases present new considerations for this Court, and that the prior dismissals are not res judicata because of fresh issues raised by the Rhoditis and Moncada decisions.

However, this plaintiff has constantly relied upon the Rhoditis and Moncada decisions throughout his various appeals, and the Courts have uniformly rejected this argument. Annexed hereto as Exhibit "B" is a copy of the appellant's Reply Brief addressed to the Appellate Division, First Department of the Supreme Court of the State of New York. This Brief on pages 4, 5, 7 and 8 relies heavily upon both Rhoditis and Moncada. This argument was rejected by the Appellate Division, and later by the Court of Appeals of the State of New York, both of which upheld the dismissal of the suit for forum non conveniens.

Garis' attorney again cited Rhoditis and Moncada in his brief addressed to the Supreme Court of the United States. Both of these authorities are cited throughout that Brief, a copy of which is annexed hereto as Exhibit "C". Please see pages 3 through 5, pages 9-10 and pages 17 through 19 of the appellant's Brief. The Supreme Court was not persuaded by this argument and dismissed the appeal and denied certiorari.

The accident which was the basis for this litigation took place on September 17, 1965, approximately nine and a half years ago. The issue of forum non conveniens has been conclusively decided by every New York Court, both Federal and State, and the dismissal has been upheld by the Supreme Court of the United States. The latest suit presents no new issues or different allegations, and deponent respectfully asks that this lengthy and costly litigation be determined by a dismissal of the present action.

s/Lawrence J. Mahoney

Sworn to
January 22nd, 1975

DEFENDANT'S SOUTHERN DISTRICT GENERAL RULES 9(g) STATEMENT

The following is a Statement of the Material Facts in this action as to which no genuine issue exists to be tried, and which Statement is submitted by the defendant in compliance with Rule 9(g) of the General Rules for the Southern District of New York in support of defendant's motion for summary judgment made herein:

1. An action by the same plaintiff against the same defendant, filed in this Court, was dismissed for Forum non conveniens by Judge Edward C. McLean in August of 1966, in an opinion reported at 261 F. Supp. 917.

2. The dismissal was affirmed by the United States Court of Appeals for the Second Circuit on November 28, 1967, in an opinion reported at 386 F. 2d 155.

3. A suit in the Supreme Court of the State of New York, County of New York, by the same plaintiff against the same defendant was dismissed on October 13, 1971 by Judge Paul A. Fino.

4. This dismissal was unanimously affirmed by the Appellant Division, First Department, on March 8, 1974.

5. Leave to appeal to the Court of Appeals for the State of New York was denied on July 14, 1974.

6. An appeal by this plaintiff to the United States Supreme Court was dismissed for want of jurisdiction on December 9, 1974 and certiorari was denied.

7. Defendant has produced and the plaintiff's counsel has accepted security in the amount of $150,000 in the form of a letter of guarantee, assuring the defendant's appearance in any suit commenced by this plaintiff in Greece, and further guaranteeing that the defendant would admit ownership, operation and control and that it would make no objection to the jurisdiction of the Greek Court and that it would waive any applicable statute of limitations.

Respectfully submitted,

DOUGHERTY, RYAN, MAHONEY,
PELLEGRINO & GIUFFRA
Attorneys for Defendant

By s/ Lawrence J. Mahoney

576 Fifth Avenue
New York, New York 10036

AFFIDAVIT OF HERBERT LEBOVICI SUBMITTED
IN OPPOSITION TO DEFENDANT'S MOTION

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

I am a member of the firm of Lebovici and Safir and have been in charge of the prosecution of this matter since its inception.

I make this affidavit in opposition to the application of the defendant to dismiss the instant action on the grounds of res judicata. The previous determination of this court that is claimed by the defendant on this application to be res judicata of the present suit is an order made pursuant to an opinion of Judge Edward C. McLean dated August 23, 1966, and which order was affirmed by the United States Court of Appeals by decision dated November 28, 1967 and reported at 386 F. 2d 155.

While the moving papers herein make extended reference to another action instituted in the Supreme Court of the State of New York for the same claim and against the same defendant, it is not claimed on this application that anything that occurred in the Supreme Court of the State of New York or on appeal therefrom is res judicata of the present action now pending. The reference thereto, by the moving papers, is therefore irrelevant to this application. It was agreed at the informal discussion with Judge Griesa that for present purposes, the dismissal of the State Court action was irrelevant.

As will appear more fully hereinafter, as well as in a memorandum of law to be submitted with this opposing affidavit, the dismissal of Judge McLean is in no sense res judicata of the instant action for the following reasons:

1. A previous application to be res judicata must be final and a determination of the substantive issues sought to be litigated. The determination of Judge McLean was not a determination of any substantive issues, but a declination or refusal on the basis of discretion that he thought he had to determine the substantive issues that were tendered by that complaint. This dismissal could not therefore bar a new action on the basis of res judicata.

2. The law as understood by the courts of this circuit at the time of the previous determination was so different and has been so changed by more recent decisions of both the Supreme Court of the United States and the Court of Appeals of this Circuit as to prevent the first determination from in any event being res judicata with respect to the present action.

3. Granting of the present application on the facts now present would constitute a denial of justice.

Before coming more specifically to the facts and issues before the Court on this application, your deponent would point out, since the subject will undoubtedly occur to the Court, that there is no question of statute of limitations present in this case at the present time. Burnett v. New York Cent. R. Co., 380 U.S. 424.

THE FACTS

The plaintiff is a Greek seaman who on September 17, 1965 was serving as a fireman aboard a vessel called the EURYTAN. The EURYTAN was owned by Compania Maritima San Basilio, S.A., a Panamanian corporation. The vessel flew the Greek flag.

In the language of the defendant's own master aboard the vessel, and while the vessel was at sea on a voyage of the east coast of the United States to the Orient, in foreign commerce of the United States, "the super heater line of the port boiler broke open and the steam "severely scalded" the fireman, Demetrios Garis. (Exhibit 19)*

The plaintiff was scalded over more than 70% of his body, and was transferred to a vessel bound for California where he was deposited ashore at San Pedro to receive treatment at a hospital there. On February 3, 1966 he was sent back to Greece where, while he was still in need of treatment, where he was promptly abandoned by defendant and now remains untreated, uncompensated and uncared for, totally disabled not only because of scar tissue and burns all over his body, but also because of impairment to his hearing resulting from the same injury.

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* Exhibits 1-20 because of their bulk are separately bound and separately handed up herewith.

The action now claimed to be res judicata of the present case was instituted for plaintiff by different counsel. Contrary to what is now understood to be the law, Judge McLean thought that there was a discretion to apply pursuant to the doctrine of forum non conveniens. By reason of more recent decisions of the Supreme Court of the United States in Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 and of the Second Circuit Court of Appeals in Moncada v. Ekberg Steamship Inc., 491 F. 2d 470, it is now understood that whether the case of a foreign seaman is or is not a proper Jones Act case is not a matter in the Court's discretion and thereby subject to the doctrine of forum non conveniens. A Federal court has no discretion to decline jurisdiction over an action properly prosecuting a right properly granted by Congress.

For reasons that this circuit thought was law at the time that this action was originally instituted, jurisdiction over the action was declined; that is, the Court refused to entertain the case, rather than dismissing the case on the merits of the action. That the court never reached the merits of plaintiff's substantive claim, that is, that he had claims under both the Jones Act and General Maritime Law of the United States, and that the Court was exercising a discretion which it believed it to have

(but which, in fact, it did not have) is clear from the decision of both, Judge McLean and the Court of Appeals to which his declination was appealed. Thus, Judge McLean himself said (261 F. Supp. 917, 919):

> "Accordingly, in the exercise of the Court's discretion, the Court declines to take jurisdiction over this action, and the action is dismissed, without prejudice to institution by libelant of a new action . . ."

Nor was plaintiff assisted in the application before Judge McLean by his failure at that time to prove on the motion what is now for present purposes indisputable that the operation pursuant to which the EURYTAN was conducted was in fact an operation principally from the United States pursuant to United States law.

On appeal, the Court of Appeals for the Second Circuit, affirmed "the discretionary act by which the taking of jurisdiction was conditionally declined." 386 F. 2d 155, 157.

Subsequently, to this affirmance by the Court of Appeals for the Second Circuit, plaintiff secured present counsel. Present counsel instituted an action in the Supreme Court of the State of New York, and it is interesting though not presently significant, that in the Supreme Court of the State of New York counsel for defendant made a motion to dismiss that action on the ground that the declination in the Federal Court was res judicata of the matter in the State Court. That application was denied.

Subsequently, an application was made in the State Court to decline jurisdiction pursuant to the doctrine of forum non conveniens. A state court, however, unlike a Federal court, is not bound to enforce a right created by Congress. It has the right to decline jurisdiction in the exercise of a discretion that it has. Douglas v. New York N.H. & H.R. Co., 279 U.S. 377. Accordingly, it was possible for the State Court to decline jurisdiction over the plaintiff's claim whereas, conceptually at least, the plaintiff's action in the Federal Court should not have been so declined.

Since neither declination reached the substantive merits of plaintiff's claim, it is respectfully submitted that there is no bar by reason of res judicata to reinstituting it now.

In the affidavit of Lawrence J. Mahoney in support of the instant application, it is stated at page 3 that the State Court declination required that the defendant provide security in the amount of $150,000 to secure the appearance in a Greek action should the plaintiff institute one there. Mr. Mahoney goes on to state:

> "This guarantee, which was accepted by Garis' attorney, ..."

This statement is inaccurate in stating that plaintiff or his attorney accepted the guarantee. All that occurred is that counsel agreed that the security posted was sufficient to form and substance. We did not accept it.

Made a part of this affidavit by reference is a bound volume containing 20 exhibits that are submitted as part of the record to be made herewith. These exhibits show more than sufficiently for the purposes of consideration of this application as one for summary judgment, sufficiently "substantial" contacts to warrant the application of the Jones Act to this case and under the General Maritime Law of the United States. The contacts indicated by these exhibits are even more substantial than were present in the cases of Hellenic Lines v. Rhoditis or Moncada.

As appears from the memorandum herewith, further reason why Judge McLean's order is not res judicata is that it was not "final".

If the declination of Judge McLean is not res judicata to the bringing of a new action, then it is of little moment that Judge McLean's order permitted the plaintiff to bring an action in Greece. The fact is that no such action was ever brought and for how demonstrably good reason.

In another action entitled Lambiris v. Neptune Maritime

Co., Inc., a Greek plaintiff similarly sought to institute an action in the Supreme Court of the State of New York for injury aboard a Liberian Flag Vessel. An application to decline jurisdiction there was denied at Special Term, but, on appeal, the Appellate Division of the State of New York reversed, stipulating in its order that in the event that a Greek court should fail to adjudicate the case "for the same matters as stated in the complaint", that the plaintiff could reinstitute his action. Accordingly, the plaintiff did in fact go to Greece and institute his litigation there under the American law, and the Greek court there said that it would not entertain the action under United States law and dismissed his complaint. When he returned to the Supreme Court of the State of New York, the Supreme Court said that the litigation in Greece was res adjudicata of the new action in New York. It is respectfully submitted that to submit our plaintiff to this same dead end process would constitute a "denial of justice" in the truest sense of that expression.

In point is the language of Judge Learned Hand in the case of the Falco, 20 F 2d 362, a case wherein no Federal right was involved and wherein declination was in all respects appropriate. There he said at page 363 as follows:

> "Normally disputes arising out of a seaman's employment are referred to the tribunals of the flag. The Ester (D.C.) 190 F. 216. Nevertheless, courts of admiralty, which are sensitive to a seaman's rights, or at least have always professed to be, will in such cases, before turning him out of court, satisfy themselves that there are no special circumstances which will leave him without adequate remedy. The Becherdass Ambaidass, Fed. Cas. No. 1,203; Willendson v. Forsoket, Fed. Cas. No. 17,682; The Topsy (D.C.) 44 F. 631; The Sirius (D.C.) 47 F. 825; The Ester (D.C. 190 F. 216). Even the protest of a consul is not conclusive, when justice requires the court to entertain the plea. The Lilian M. Vigus, Fed. Cas. No. 8,346. Moreover, the discretion of the instance court must be exercised with a due regard to the circumstances, and we are required to examine the grounds of its decision, before we accept its conclusion. Courts are primarily established to decide the disputes of all suitors over whom they have jurisdiction, and some reason must be shown for their abdication."

Defendant's counsel says in his moving papers that plaintiff has made these points and cited these cases before. They were not made and the facts now available were not available at the time of Judge McLean's decision. The fact further remains that the State Court, as distinguished from this Federal Court had an absolute discretion to keep or decline this case. A Federal Court does not have this option.

Attached to this affidavit as Exhibits 21 & 22 are copies of the decisions of the Greek Courts in the Lambiris case refusing to apply the applicable United States law.

Perhaps to pile injustice on top of the failure of the Courts to this point to reach the merits of Plaintiff's claim is the additional part that the defendant is no longer in business. The granting of the defendant's motion would add to the denial of a place to sue of a practical defendant. As appears from Exhibit 23 attached hereto, the defendant has in effect gone out of business by the sale of all the remaining vessels of MARCHESSINI LINES. To the problem of no place to sue is added that of no one to sue.

Assuming therefore from the foregoing that Judge McLean's order is not res adjudicata, what is now shown to this Court that was not shown to him, that constitutes "substantial" contact of the transaction with the United States Warranting application of the Jones Act pursuant to the cases cited?

In the first place, Exhibits 11 and 12 both show that the stock ownership of BASILIO was solely in the hands of United States Citizens consisting of P.D. Marchessini, and his immediate family. As was noted by the Court in Moncada, this by itself has been held to be a sufficiently "substantial" factor to warrant application of the Jones Act.

In Hellenic Lines v. Rhoditis, the Supreme Court of the United States affirmed the holding in Pavlou v. Ocean Traders Marine Corporation, 211 F. Supp. that a case of operations in the United States would be a sufficiently "substantial" factor to justify application of the Jones Act. With respect to this, the proof shows (Exhibit 1) that the address for BASILIO is c/o P. D. MARCHESSINI & CO. (NEW YORK) INC., 26 Broadway, New York 4, U.S.A.

The Transportation Tickler for 1965 (Exhibit 5) discloses that the BASILIO ships were actually operated by P. D. MARCHESSINI & CO. (NEW YORK) INC., 26 Broadway, as General Agent.

Exhibit 6 is a collection of advertisements appearing in the New York Times for 1965. These again show the seat of the operation to be at 26 Broadway, and amusingly, the last of these, the "Nursemaid" advertisement identifies the master as a "Marchessini" captain. The name Marchessini and MARCHESSINI LINES is identified only with the New York operator and operation.

Exhibit 4 if a collection of advertisements appearing in the Journal of Commerce. They show the regular liner operation of the BASILIO vessels from New York to Europe and New York to the Far East and return including the EURYTAN the vessel herein. So completely is the operation associated with the name Marchessini that the name BASILIO nowhere appears.

Alexander Marchessini, the son of P. D. Marchessini, President of the New York Corporation testified that "MARCHESSINI LINES" was a trade name referring to a "joint service" owned by BASILIO and another Marchessini corporation (Exhibit 3).

The Bills of Lading issued for cargo carried on MARCHESSINI LINE vessels were issued by P.J. MARCHESSINI (NEW YORK) & CO., INC., 26 Broadway, N.Y. (Exhibit 8, p. 3).

In order to qualify as a common carrier operating in foreign commerce of the United States, permitted to enter into rate-fixing agreements, a procedure otherwise in violation of the anti-trust laws, it was necessary that certain documents be filed with the Maritime Commission. This filing was performed for MARCHESSINI LINE by P. D. MARCHESSINI & CO. (NEW YORK) of 26 Broadway as were the necessary Tariffs. MARCHESSINI LINES, one of the vessels of which was the EURYTAN then became "a person subject to the Shipping Act of 1916, hence subject to the Commission's jurisdiction". (Exhibit 10, p. 2)

Exhibit 16 shows the accounts for the operation of the EURYTAN for a period of one year during which the plaintiff suffered his accident. These accounts show that P. D. MARCHESSINI & CO. (NEW YORK) collected during the year $750,000 earned by the EURYTAN, and disbursement by it of $264,000 for materials,

supplies, wages and other expenses, leaving a profit from this operation of $486,000. This is certainly indicative of operation from New York by P.J. MARCHESSINI (NEW YORK) as agent for BASILIO.

During this time the financing of the operation was conducted with Chase Bank, New York by P. J. MARCHESSINI & CO. (NEW YORK) (Exhibit 13).

When the plaintiff sustained his injury, P. J. MARCHESSINI & CO. (NEW YORK) was notified (Exhibit 19) and the California bills for his hospitalization were paid by it.

The operation of the EURYTAN and other vessels in "foreign commerce of the U.S." subject to the jurisdiction of the U. S. Maritime Commission has an additional significance beyond the filing of those documents showing the seat of the operation in New York. These show not only additional connection factors with the United States but meaningful availance by the defendant of the benefits of the laws of the United States.

In summary, therefore, it should be clear to this Court that the plaintiff has a very viable claim under the Jones Act and the General Maritime Law of the United States; that no court has ever reached the merits of this claim; that to suggest that the plaintiff can prosecute this claim

anywhere but in this Court is utterly and completely futile; and, that to again deny the plaintiff his day in court on the merits of his claim is to do an act of injustice.

WHEREFORE, plaintiff respectfully requests the denial of the defendant's motion.

s/Herbert Lebovici
HERBERT LEBOVICI

Sworn to
June 10th, 1975

DECISION OF GREEK COURT OF FIRST INSTANCE IN CASE OF LAMBIRIS V. NEPTUNE MARITIME CO.

REPUBLIQUE HELLENIQUE

MINISTERE DES AFFAIRES ETRANGERES
TRADUCTION OFFICIELLE No. 38172

Official Translation

No. 999/1972

The Piraeus Single-Member Court of First Instance

(Labour Disputes Dept.)

Composed of: Olymbios Alifieris, Judge of First Instance, appointed by the President,

At the Court's public session in the Court's Hall of Audiences of July 28, 1972, in the presence of the Clerk Dem. Mimitopoulos, was called upon to judge and decide on the following case:

On the action-at-law of 12.2.1972, filed sub No. 524/3.3.1972, for seaman's claims amounting to U.S. dollars 250.000.0

By the plaintiff photius George Lambiris, domiciled in Argolis-Kranidi, present through his attorney-at-law Panaghiotis Katrakis, against:

Exhibit 21

The defendant, the Limited Company established in MONROVIA LIBERIA under the name: "NEPTUNE MARITIME COMPANY, MONROVIA, lawfully represented, present through their attorney-at-law Jacobina Andrikopoulos.

The case having been called out for hearing from the Roll of Cases for hearing by the Court,

The Court,

Having heard the attorneys-at-law of litigants referring themselves to their conclusions on the case,

Having gone through the file of proceedings,

According to the law:

1. Whereas, as stipulated by article 25 of the Civil Code (Compulsory Law 2250/1940) "the obligations arising out of agreements are ruled by the law to which the contracting parties subjected themselves, this provision means to convey that: if the application of the law of a certain State was agreed upon concerning the lawful consequences deriving from the agreement drawn up, this law is applicable by exclusion of the law of another State, which would have been applicable; at any rate, as stipulated further by the same article 25 of the Civil Code, "in case of lack of agreement as to the law appli-

cable, the law most appropriate to the agreement under all circumstances is applicable". This last stipulation means that the Court shall investigate the special circumstances, and shall apply the Law of the State which derives from the investigation of such special circumstances as the most appropriate to the agreement.

2. Whereas, in the present instance, from all documents invoked and lawfully produced by litigants, and the deposition of the plaintiff's witness examined on oath by the Court, the following facts result: That the plaintiff, a Greek citizen, domiciled in Greece, enlisted as a seaman in Trieste, Italy, whence at the expense of the defendant he was sent from Trieste on 18.5.1969 as a deck-boy on their cargo-ship "THETIS", 12800 tons D.W., of Liberian nationality, on board which he served until 29.7.1969, date on which he was discharged, having been repatriated to Greece owing to disablement through an accident, and incapacity for further work, the defendant comes also within the cycle of Greek interests, exercising a shipping enterprise through the defendant Company, merely as an economic unit more advantageous for them. The agreement of enlistment

of the defendant was drawn up in Piraeus, as per the private agreement of 14.5.1969 signed by the defendant in the Greek language. In actual fact, this agreement provided for the application of the Greek law on relations of litigants resulting from the enlistment. This is underlined by the following sentence: "and according to the clauses of the Greek Collective Working Agreement in force". Seeing that, in accordance with the legal status in force in Greece, the Collective Working Agreements of Ship's Crews constitute essential laws of the Greek State, ruling the relations resulting from the enlistment of crews, same as merely further completed by the general provisions of the Greek legislation. However, under whatever interpretation, that is to say: even if the application of the Greek law concluded by the agreement did not concur, the Greek law would have been again applicable, because from the circumstances stated above, the Greek law is the only appropriate, so far as the relations of litigants resulting from the enlistment on board the above ship are concerned, even the name of which is Greek, and, of course, not the law of Liberia which was in no way taken into consideration by them. The above are additionally confirmed by the fact that

the Greek Port Authorities alone took up the plaintiff's case, having carried out a relevant sworn-in preliminary inquiry, and not the Liberian Port Authorities, which from documents produced do not seem to have interfered in any way.

3. Whereas the action-at-law under consideration is rejectable as not lawful, since the plaintiff by same pursues the award to him the equivalent in drachmae of the sum of U.S. Dollars 250,000.00, basing himself exclusively on the application of the Liberian Law, and not invoking the presuppositions for the application of the provisions of the Greek law ruling out his case, and that the provisions on which the plaintiff could base his claims according to the specific incidents are Royal Decree 24/7/-25/8/1920, re: coulfication of laws concerning indemnification of labourers and employees involved in accidents while on duty", provisions by which an indemnification is provided for labour accident irrespective of cause, and the provisions of article 914 and following of the above Civil Code, providing in principle an indemnity through fault.

4. Whereas, according to the Court's appreciation of facts resulting from the appreciation of the evidence produced, the plaintiff reasonably doubted as to the issue of the lawsuit, judicial expenses incurred on both sides should be compensated.

THEREFOR:

Judging both litigants present,

The Court rejects the action-at-law under consideration, and

Compensates between litigants judicial expenses incurred on both sides.

Judged, decided upon and published in Piraeus at a public extraordinary session on August 17, 1972, in the absence of litigants and of their attorneys-at-law,

The Judge of First Instance — The Clerk

Olymbios Alifieris — D. Mimitopoulos

A true copy, Piraeus 27th February, 1972

The Clerk: Seal Sgd. Tassia Roussou

SEEN for its lawful stamping and issue by order of priority.

Piraeus, 27th February, 1972

The Head of Dept.

Seal Sgd. John Chrysandja

Here follow legalizations of signatures by the President of Piraues Court of First Instance, the the Ministry of Justice. Official Translation from the attached original in Greek.

Athens, 19th August, 1973

The Translator

DECISION OF GREEK APPELLATE COURT AFFIRMING DECISIONS OF COURT OF FIRST INSTANCE IN CASE OF LAMBIRIS V. NEPTUNE MARITIME CO.

REPUBLIQUE HELLENIQUE

MINISTERE DES AFFAIRES ETRANGERES

BUREAU DE TRADUCTION No. 38172

Official Translation

No. 3762/1973

The Athens Court of Appeals, Dept. D., Ordinary, Composed of judges: Stylianos Diamandakos, Judge of the Court of Appeal and Acting President (the President and senior judges being unable to attend), Emmanuel Cavallieros, and Emmanuel Andicadakis, Judge-Advocate, and both Judges of the Court of Appeal,

At the Court's public session in the Court's Hall of Audiences of March 17, 1973, in the presence of the Clerk Theodore Makrantonis, was called upon to judge and decide the case between:

The appellant Photius George Lambiris, domiciled in Kranidi-Argolis, present through his attorney-at-law Pan. Katrakis, and

Exhibit 22

The respondent, the Limited Company established in MONROVIA, LIBERIA, under the name: NEPTUNE MARITIME COMPANY-MONROVIA, lawfully represented, present through their attorney-at-law George Georgiades.

Concerning the action-at-law of February 12, 1972 of the plaintiff-appellant, filed sub No. 524 with and addressed to the Piraeus Single-Member Court of First Instance in respect to a claim arising out of enlistment as a seaman, final decision No. 999/1972 was issued by the Court aforesaid which rejected said action-at-law.

The above decision was appealed against before the Court first above named by the appellant by his appeal of October 20, 1972, lawfully filed with the Court Sub No. 608, whereby he requested as per same, which introduced for hearing at the Court's session first above mentioned, and called out for hearing in due order from the relevant Roll of Cases for hearing by the Court, same is being discussed in the presence of litigants, present as mentioned

above.

The court,

Having heard the attorneys-at-law of litigants, who developed also verbally their conclusions in writing filed with the Court,

Having gone through the file of proceedings,

According to the law:

In view of the fact that the appeal under consideration against decision No. 999/1972 of Piraues single-Member Court of First Instance, who judged the case according to the procedure of article 663 of the Code of Civil Procedure, was judged lawfully and in due time, same is accepted in its form, and is subject to substantial investigation.

In view of the fact that in the action-at-law on which the decision being assailed was issued, by appreciation of the whole of its contents, the plaintiff and actually the appellant states that, by a Seman's Working Agreement, drawn up in writing at Piraeus on 14.5.1969, between him and the locally established Limited Company

under the name: "POSSIDON SHIPPING CO. LTD. acting in a capacity of Shipping Agent and representative of the defendant and respondent Company, he was engaged on board the cargo-ship "THETIS", capacity 12,800 tons D.W. of the defendant, flying the flag of Liberia, to offer his services as deck-boy for an indefinite period of time, as against a monthly of thirty-three (33) Pounds Sterling, plus food in kind, evaluated at Pounds Sterling 13.02 per month. That in implementation of said Agreement, he enlisted on the above ship of the defendant in Trieste on 18.5.1969, and worked on board in the capacity in which he was engaged until 29.7.1969, date on which, on account of injuries through an accident and a violent event in the carrying out of his duties, and through same, under the conditions referred to in the action-at-law, he was dismissed by the Captain, and after hospitalization for 15 days at the place of the accident (Porto Cavello-Venezuela), he was repatriated to Greece, where his hospitalization was continued

at the Clinic "THEOTOKOS" in Piraeus for 15 days, and subsequently for 6 days at the Public Ophthalmological Athens Clinic, and at the Athens Polyclinic, from 4.9.1969 to 15.9.1968, at the expense of the defendant, having become thereafter partly and permanently disabled for any kind of work, and in respect to that which he was doing at the time of the accident as a seaman. Pursuant to the foregoing, he requests by his action-at-law that the defendant shipowners be sentenced to payment to him of the indemnity claimed in same, on the basis of the provisions of the Liberian Maritime Law in correlation with those of the U.S.A., applicable in the present instance on account of the flag flown (Liberian) by the ship in question, and an indemnity as a pecuniary satisfaction for moral hardships endured by him through the above labour accident, according to the Law of the Liberian Republic. The decision appealed against rejected said action-at-law, as not founded according to the law, as per the provisions of the Greek legislation (Law 551/1914, as amended and in force today, and articles 914 and 932 of the Civil Code), law to which the dispute was subject for the reasons set out

in the decision appealed against, against which decision the appellant-defendant actually complains for the following reasons contained in the appeal:

In view of the fact that, according to article 25 of the Civil Code, the obligations deriving from agreements are settled by the Law of the State to which the Contracting Parties subjected themselves, and in case of lack of such agreement as to the law applicable, the law most appropriate to the agreement under all circumstances is applicable, which is found out as stated in the Introductory Report to the case, after evaluation of the data founding the obligation, and appreciation of the circumstance and conditions which concur having regard to the intricate international transactions, which render necessary the findings out on each particular occasion of the most appropriate law (See relevant: A.P. 204/1963, 615/969N., B.III.116 and N.B.18,528. In the present instance, pursuant to the re-appreciation of the whole evidence date, i.e. the deposition of the witness for the evidence examined on oath, contained in the Minutes of the above Court's session under

same number as the decision appealed against, invoked and lawfully produced, of all documents invoked and produced by litigants, among which Affidavits drawn up by witnesses before a Notary Public, the sworn-in depositions of such witnesses, drawn up before the Naval Officer Evanghelos Giannakopoulos, and Ensigns I.S. Vossos and Nich. Varfis, who carried out the preliminary inquiry concerning the wounding of the plaintiff, and the Report of sworn-in preliminary inquiry of 17.6.1971 of Matourekas, Harbour Corps Official, for the inference of indirect evidence, and generally from the evidence procedure, it was proven, in the Court's opinion that: by a Maritime Working Agreement, drawn up in Piraeus on 14.5.1969 between the plaintiff-appellant and the locally established Company under the name "POSSIDON SHIPPING CO. LTD.", acting as Shipping Agent and representative of the defendant-respondent company, in respect to which a private agreement under same date was drawn up in the Greek language, signed by the plaintiff, the authenticity of whose signature was not contested, the plaintiff, of Greek nationality, was engaged on the defendant's cargo-ship "THETIS", 12.800 tons capacity D.W.,

manned with a Greek crew, and flying the Liberian flag, to offer his services on board said ship as a deck-boy and indefinite period of time, against a monthly salary of Pounds Sterling thirty-three (33), plus food in kind, evaluated as Pounds Sterling 13.02, according to the Collective Working Agreement of 16.12.1967, published in the Official Gazette Folio No. 370/6.6.1967, Volume B', Collective Agreement to which litigants subjected the agreement of enlistment of the plaintiff as a seaman under litigation by virtue of the above private agreement, as stipulated in same (see said private agreement being produced), according to which it is stipulated that in implementation of the agreement he enlisted as seaman on board the above ship of the defendant in Trieste on 18.5 1969, and worked on board same in the capacity in which engaged until 29.7.1969, when, on account of the injuries suffered, about which hereafter, he was dismissed by the Captain, and after hospitalization for 15 days at the place of which he suffered the injuries (Porto Cavello-Venezuela) he was repatriated to Greece, where his hospitalization was continued at the Clinic in Piraeus "THEOTOKOS"

for 15 days, and subsequently for six (6) more days at the Athens Ophthalmological Clinic and the Athens Polyclinic from 4.5.1969 to 15.9.1969 at the defendant's expense. From the above actual facts, and particularly from the facts that: the agreement of enlistment as a seaman was drawn up in Piraeus in the Greek language, that the plaintiff is of Greek nationality, and so is the whole crew of said ship belonging to the defendant, ship which, besides, bears the Greek name "THETIS", and, moreover, that the defendant, as proven by the evidence data mentioned above, comes within the cycle of Greek interests, also exercising a shipping business through the defendant Company as an economic unit more advantageous for them, and that by the aforesaid private agreement the agreement of enlistment of the plaintiff as a seaman under litigation was subjected to the Collective Working Agreement mentioned above, it is inferred without doubt in the Court's opinion that litigants indirectly but clearly wished that their relations from the enlistment be ruled out by the Greek Law, which otherwise from all the above special circumstances is the most appropriate law applicable in the present instance.

Therefore, the decision appealed against having accepted the foregoing rightly appreciated the evidence produced, so that arguments under 1 and 4 of the appeal to the contrary are rejectable.

In view of the fact that, according to the true interpretation of article 1 of Law 551/1914 (codified by Royal Decree of 24.7.1029), as same is in force, amended, after the coming into force of the Civil Code, by Article 38 of the Introductory Law of the Civil Code, the accident is considered as an accident resulting from a violent event, which occurred during the carrying out, or as a result of the work being carried out, to a labourer or employee carrying out work or enterprises such as mentioned in the following article, and for which an indemnity is payable according to its provisions for any harm to the employee's or labourer's physical constitution, which is the result of a violent and sudden external cause, i.e. a lien to the physical constitution of the injured person, and inherent with the work being carried out and having happened during the carrying out of such work, or simply related with

the work being carried out, i.e. of a nature such as that, on account of its relation with the work being carried out, to have contributed in a certain measure to the occurrence of the injury. (A.P. 517/1969 EED 20,300. . In the present instance, from the above evidence, it was also proven that the above injury of the plaintiff took place under the following conditions, and particularly, on the morning of 29.7.1969, at about 8.20 hours a.m., when the ship of the defendant Company was the port of Porto Cavello in Venezuela for the unloading of the cargo transported by said ship at that port (wheat), and while the men of the crew were engaged in placing the railings at No. 1 to the right hold on the deck of said ship, which railing had been taken off by the stevedores for the purpose of putting into place the means of unloading the wheat, the plaintiff, joking with a colleague of his by name of Pan. Kolaras, and stepping backwards without paying attention (absent-minded) hit on a deck eye-bolt, as a result of which he fell from the ship on the quay from a height of four (4) meters having suffered the injuries mentioned in the action-at-law,

as a result of which he became partly permanently disabled for any work and in respect of seaman's work which he was carrying out at the time of the accident. All the foregoing, that is to say: the circumstances under which the plaintiff was injured, clearly result from the Captain's log-book, a photocopy of which is duly produced, and in which the Captain mentions textually all that was stated above, and which can in no way be annihilated by the deposition of the evidence witness examined by the Single-Member Court of the First Instance, which judged the case, who, actually, does not say anything about this, except the expression of an opinion, as a legal man, concerning the law applicable in the present instance, the deposition of Nicholas Stringos examined before the Naval Official Evanghelos Giannakopoulos, who was also examined before the Notary Public in and for Kranidi Demetrios Vonta (see Deed of said Notary Public No. 7814/12.2. 1970), a relative, as acknowledged by him, of the plaintiff, and the depositions before the Ensigns who carried out an administrative sworn-in inquiry of the witnesses Evaghelos Lymberopoulos and Basil Eliades, the first two sailors and the third apprentice-Engineer, serving at that time with the plaintiff on board said ship of the defendant Company, as

stated by them in their depositions. who, eventually, have no direct conception of conditions, as not being eye-witnesses under which the plaintiff was injured, and, particularly, whether the plaintiff was injured at the time he was carrying out a specific duty, and through same, or at a time he was playing with another colleague of his, and, specifically, with the aforesaid Pan. Kollara, as certified according to the foregoing by the Captain in the relevant log-book, but that they are merely acquainted with the fact from third-party information, which renders in several instances their depositions conflicting and contradictory. And, specifically, out of said witnesses, Nicholas Stringos, while in his deposition before Naval Official Giannakopoulos certifies that the plaintiff at the time he was injured transported an empty drum on the ship's deck while on duty, in his deposition before the Notary Public he certifies that he was transporting different tools (see his above deposition), whilst the second of them, Evanghelos Lymberopoulos, vaguely deposits that "as I have heard from Bosun G. Bezas" the plaintiff was ordered to do "some kind

of work", without, however, mentioning what kind of work, and that he heard this from a certain boatswain, whilst the third witness Basil Eliades, examined before Ensign Varfis, equally does not certify by which boatswain the plaintiff was ordered to transport "different tools" in execution of a designated duty, and equally does not mention how he is acquainted with this fact (i.e. the duty ordered to be performed at that time by the plaintiff). On the other hand, the results of 17.6.1971 (Report on sworn-in preliminary inquiry) of Mantourekas, mate Harbour Corps, who carried out the sworn-in preliminary inquiry, as stated in same, comes to the conclusion that the injury which occurred on 29.7.1969 to the plaintiff took place while he was carrying out the duties entrusted to him, and through same, without examining, as he ought, he who gave this order to the plaintiff to carry different tools, i.e. George Bozas, or the colleagues of the plaintiff named in the Captain's log-book as eye witnesses, or the aforesaid Pan. Kollaras with whom the plaintiff was joking at that time, of

any of the Officers serving at that time on board the ship, seeing that in the Captain's log-book the actual facts are exposed in a quite different way, and without mentioning in conclusion on the basis of what Affidavits he reached his conclusion. Therefore, the Report in question is erroneous. In view of the foregoing, the accident of the plaintiff, having taken place under the aforementioned circumstances, does not constitute a labour accident caused by a violent event, and as a result of his work, in the sense of art. 1 of Law 551/1914, seeing that at the time of the accident the plaintiff was not on duty, but in a state of inactive alertness. Therefore, this accident has no relation whatever to the labour agreement between the plaintiff and the defendant Company, nor does it seem to be the main cause, and a consequence resulting thereby. Therefore, the judgment appealed against having ruled in this manner, and subsequently having rejected as unfounded the action-at-law under consideration, so far as the adjudgment of an indemnity to the plaintiff is concerned for the accident in which he was involved in the sense of the aforesaid article 1 of Law 551, correctly, al-

though under a different justification, did it interpret and apply the above provisions of Law 551/1914, as amended and valid today, and correctly did it appreciate the evidence produced, so that the 5th argument in the appeal to the contrary is rejectable, as unfounded.

In view of the fact that, according to article 223 of the Civil Code, as against damages not affecting property items, a pecuniary compensation is only due in the cases provided for in Chapter 39 re: Torts, article 932, in the part of said Chapter dealing with "Obligations" (articles 914-938), according to which, on account of a tort, i.e. on account of any of the torts listed in this chapter, independently of the indemnity for property damage, the Court may adjudge a reasonable, at discretion, pecuniary satisfaction for moral hardships suffered.

From the correlation of these provisions, it clearly results that for there being an instance of adjudgment by the Court of a pecuniary satisfaction for moral hardships suffered, in application of article 932 of the Civil Code, it is necessary that, there concurring

no other case of tort of those listed in the aforesaid Chapter (articles 932-935), according to which for the founding of torts an offense is not required, but there concurring a tort in the sense consecrated by Article 914 of the same Code, requiring that the person which caused the tort to be in fault, it results that, on a labour accident on which according to article 1 of Law 551/1914 right of indemnity is given to the injured, or in case of death to persons entitled to such an indemnity in his place, towards the owner of the enterprise, so that there be an instance of adjudging such a pecuniary satisfaction, it is necessary - the above law not providing for this - independently of the concurrence of the provisions of article 16 of this Law, i.e. fraud on the part of the owner of the enterprise, or non-adherence to safety measures, that the accident be due under all circumstances to the fault of the owner of the enterprise or of his subordinates according to article 922 of the Civil Code (A.P. 9/1963 EED 22,275). Therefore, the provisions of article 16

of Law 551/1914 not concurring in the present instance, and there being no fault on the part of the defendant-respondent or of their subordinates (Captain), according to what was accepted in the preceding inference as confirmed actual facts, there concurs no case, in respect to the accident which befell the plaintiff, for the adjudgement to him of a pecuniary satisfaction, in application of article 932 of the Civil Code for the moral hardships suffered by him on account of the accident in which he was involved. Therefore, since the judgment appealed against, and which subsequently rejected the action-at-law, so far as the adjudgment of a pecuniary satisfaction to the plaintiff for moral hardships suffered through the accident in which he was involved, correctly, although under a different justification, did the judgment, interpret and apply the aforementioned provisions, evidently the 5th argument of the appeal to the contrary (in its second part) is rejectable as unfounded.

It being accepted by the judgment assailed, as it

results from the second part of the inference in same, after due appreciation of the evidence, that applicable in the present dispute is the Greek Law, according to article 25 para. 2, of the Civil Code, as the most appropriate law under all the above special circumstance, it is futile to examine the second argument of the appeal, whereby the judgment assailed is exclusively attacked in its relevant inference re: application of the Greek Law in the present instance, and subjection to the provisions of para 1, of same article 25 of the Civil Code, of litigants to the Greek Law, since the judgment appealed against accepted that by an explicit agreement between litigants and particularly by the agreement drawn up in writing, re: enlistment as a seaman of the plaintiff, same were subjected to this law. Therefore, the relevant justification of the judgment is in itself sufficient to found the decision pronounced by the judgment appealed against, reason for which same is rejectable as unfounded.

In view of the fact that under article 179 of the Civil Code, the transaction is null and void as contrary to

good morals, if any party taking advantage of the need, simplicity and inexperience of the other, concludes or obtains for himself or a third party benefits which under the particular circumstances obtained are in evident disproportion to the grant, from said provision it clearly results that the party contracting with the one in need should, on the one hand, by taking advantage of this need, to conclude or receive for himself or a third party benefits, which under the particular circumstances involved are in evident disproportion to the grant. In the present instance the plaintiff and appellant alleges that at the time of the drawing up of the above agreement of his enlistment as a seaman on 14.5.1969, the defendant-respondent taking advantage of his simplicity and need to find work concluded that the applicable law in respect to this agreement shall be the Greek Law, and particularly the aforementioned Collective Working Agreements, which law, however, differs substantially from Laws of the Liberian Republic and the U.S.A., so far as the protection afforded to him in the present instance is concerned. This argument,

however, independently of whether the above facts constitute in the sense of the above provisions a need, since the plaintiff does not invoke that the defendant was aware of his need, his argument does not contain the prerequisites of the law, reason for which same is rejectable as unfounded. Equally rejectable as unfounded is the further argument of the plaintiff-appellant, according to which the above agreement, by which it was concluded by the defendant that the law applicable in the present instance is the Greek Law, is null and void, as contrary to public order, as concurring with the aforesaid provisions of article 25 of the Civil Code, and not contrary to any other provisions of the Greek Law.

In view of the fact that from all the foregoing, and there being no further argument for an appeal to be investigated, the appeal under consideration should be rejected in its whole as unfounded, judicial expenses of the present degree of procedure being compensated wholly between litigants according to article 179 of the Code of Civil Procedure, as the plaintiff reasonably doubted as concerns

the law to which he was subject, as hereafter.

THEREFORE:

The Court,

Judging litigants present and defending themselves,

Accepts in principle and rejects in its substance the appeal under consideration, and

Compensates judicial expenses of the present degree between litigants.

Judged, decided upon in Athens, this 15th day of May, 1973.

The Acting President — The Clerk

St. Diamantakos — Th. Makrantonis

Published in Athens, this 16th day of May 1973.

The Acting President — The Clerk

St. Diamantakos — Th. Markantonis

A true copy, Athens 11th August, 1973

The Clerk, grade 9

Sealed Sgd. D. Yannatou

SEEN for its lawful stamping and issue by order of priority.

Athens, 11th August, 1973

The Clerk, grade 9

Sealed Sgd. D. Yannatou

Here follow legislations of signatures by the president of the Athens Court of Appeal, and the Ministry of Justice.

Official Translation from the attached original in Greek.

Athens, 21st August, 1973

The Translator

DAILY SHIPPING GUIDE 4/9/74

NEWSPAPER CLIPPING RE SALE OF MARCHESSINI LINES

Ta Peng Acquires Marchessini Lines

New York — Byron P. Shaw, President of Transnational Maritime, Inc., New York-headquartered owners representatives for Ta Peng Line of Taiwan operators of a regular, independent fortnightly service between U. S. Atlantic and Gulf ports and the Far East, has announced the acquisition of Marchessini lines by Ta Peng.

Ta Peng, started by its Chairman, P. C. Hsiao with a tiny 200-ton craft sailing between Taiwan and the Pescadore Islands, where he was born, has been active in the U. S. trade for only about two and a half years. Its fleet now numbers 60 vessels, totalling almost one million tons deadweight with the acquisition of the five break bulk ships purchased from the Greek-held Marchessini Lines which, Mr. Shaw noted, has been around the trade for some 20 years.

The purchase places Ta Peng Line in the position of being the first Far East-based operator offering truly world wide services. The addition of the five Marchessini vessels to the 13 Ta Peng presently employs in its Far East service brings the number of ships in the U. S. Far East run to a total of 18. Future plans call for three additional vessels to be added to the service, increasing the total number to 21 ships. Of these five will eventually be placed in other Ta Peng trades.

Of the remaining 16 ships, Ta Peng will maintain eight in the U. S./Far East run, and eight will be employed in the Far East/Europe trade, returning to the Far Eastern ports from Europe via U. S. Atlantic ports. The European service will continue to serve the ports of London, Rotterdam, Hamburg and Antwerp.

In addition to its two services to United States ports - on occasion a West Coast call is included in the itineraries - Ta Peng operates ships from the Far East to the Middle East and India, and over a wide range of countries in the Far East from Korea to Australia with a well-rounded fleet including refrigerated ships, log carriers and breakbulk freighters in both tramp and liner services. The five newly-acquired Marchessini ships will provide refrigerated space, deep tanks and container space, as well as passenger accomodations, according to Mr. Shaw.

The five vessels includee in the transaction are the Eurypylus and Eurytion, both 10,430 tons and built in 1959 and 1960 respectively. Present plans call for each ship to be turned over to Ta Peng upon its arrival at Taiwan for registry changes from Greek to Panamanian flag. While crews onboard will remain unchanged, the operation of the ships will be strictly under Ta Peng's jurisdiction and the Marchessini name will be dropped. First vessel transfer at Taiwan is expected about September 2, 1974.

Mr. Shaw viewed the growth of Ta Peng Line as phenomenal . . . from its early, one-vessel start to its present worldwide, 60-vessel fleet, and remarked that since Ta Peng is owned outright it has made these gains without financial support from any government sources.

Transnational Maritime, Inc., will continue to represent all the services of Ta Peng Line in the United States, operating from larger quarters at its present 25 broadway location. Personnel will be expanded accordingly to serve the needs of clients of the enlarged service.

EXHIBIT 23

LAW OFFICE
LEBOVICI AND SAFIR

October 31, 1975

Judge Thomas P. Griesa
United States Courthouse
Foley Square
New York, N.Y.

Re: Garis v. Compania Maritima San Basilio, S.A.
Index No. 74 Civ. 5527 (TPG)

Honorable Sir:

You will recall that at our last meeting of October 24, 1975 your Honor indicated that the only case that seemed to have some relevance was Vassos v. Societa Trans-Oceanica Canopus, S.A., 272 F.2d 182. At the end of our meeting you kindly granted permission to the writer to submit to you this letter in which my thoughts with respect to this case could be submitted to you. I do so herewith.

As a necessary prelude to a discussion of the case I would restate in capsule form only, our contention supported by the cases in our memorandum that there can be no res judicata short of a determination of the substantive issues of the case sought to be brought again. It was the determination of all, including yourself, that there has never been any determination of the substantive issues of the plaintiff's claim.

Nonetheless, it is the contention of our adversary, to which you are giving serious consideration that there may be something, perhaps less than res judicata, having the effect of renewing the claim, a sort of de minimis res judicata. We submit of course that the very essence of the doctrine is the corollary that in the absence of a valid res judicata,

as such, a party has the right to submit or correct previous deficiencies with additional material not submitted and certainly in the case where the material was not available to the party seeking to renew. Just for example, it is, without the citation of cases, permissable to start a new action with a complaint that supplies deficiencies in a previous complaint. So too, according to the cases in our memorandum as well as Rule 41(G) Federal Rules of Civil Procedure involuntary dismissal on a jurisdictional basis cannot be res judicata. The rule states:

> "Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue . . . operates as an adjudication on the merits." (Emphasis added.)

See also Sarlis v. Ohio Nat. Life, 148 F.2d 128; Loucke v. U.S. (D.C.N.Y.) 21 F.R.D. 305; Williams v. Minnesota Mining & Mfg. Co., 14 F.R.D. 1. The quoted rule is an obvious reference to the juris prudence that to have a res judicata it is necessary to have a determination on the merits, and there can be no such where the court has not retained jurisdiction to permit a determination on the merits.

The necessary meaning of all of this is that there is no such thing as a dismissal that is res judicata that it nos on the merits. Stating it on reverse only a dismissal that is res judicata (on the merits) will operate to prevent the institution of a new suit. A plaintiff with a valid claim is entitled, like a dog entitled to one bite, to one fair crack at the merits. Concededly this the plaintiff here has not had.

Nor, does Vassos v. Societe Trans-Oceanica Canopus, S.A., 272 F.2d 182 hold otherwise.

The defense of statute of limitations, not present here, is a defense which reaches the merits of the claim and, this is a substantive (merits) issue that was reached

in that case by the lower court in the decision of Judge Bicks which was affirmed on appeal in the Vassos decision now referred to by the present court.

In affirming the lower court decision and in stating that Judge Edelstein's and Judge Bicks' decisions had reached the substantive issues of the case, Judge Bicks said that the prior decision of Judge Edelstein though appealable had never been appealed and went on to say

> "While comity persuades but does not command, Mast, Foos & Co. v. Stover Mfg. Co., 1900, 177 U.S. 485, 488, 20 S.Ct. 708, 44 L.Ed. 856, and there is no imperative duty to follow the earlier ruling. Dictograph Products Co. v. Sonotone Corp., 2 Cir., 1956, 230 F.2d 131, 135, a defeated suitor should pursue his remedy by appeal and not shop about in the hope of finding a Judge favorably disposed to his view." [Emphasis added.]

Judge Bicks then went on to say

> "Libelant has presented no controlling facts which were not before Judge Edelstein." [Emphasis added.]

Here the situation is entirely different.

Here the decision of Judge McClean, which defendant would now cite as res judicata was appealed, and was affirmed. Both Judge McClean's decision and the Court of Appeals decision went on the basis of the law as stated in Tjonaman v. A/S Glittre, 340 F.2d 290 and Tsakonites v. Trans-Pacific Carriers Corp., 368 F.2d 426. But we know that both the law expressed in those decisions and the judicial attitude toward a situation such as that now present has been overruled and reversed by the decisions of the Supreme Court in the cases

of Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306; Moncada v. Lemuria (Ca. 2), 491 F.2d 470 and the later Tsakonites v. Trans-Pacific Carriers Corp., 322 F. Supp. These later cases of course hold, as other cases since Judge McClean's decision have held, that present substantial connecting factors invoking the Jones Act, the doctrine of forum non conveniens is not applicable and jurisdiction must be retained. Even under previous counsel, the plaintiff did not "shop around" looking for a favorable judge. He did the best that he could under the circumstances wherein the law enunciated by the courts was different than the Supreme Court has since ruled it should have been. This in itself is a reason why the decision of Judge McClean is not required to be adhered to for any reasons of judicial respect or comity in a validly pleaded case under the Jones Act.

Furthermore, assuming that Judge McClean would have decided otherwise had he known what the Supreme Court and the Court of Appeals for the Second Circuit have since held, if he had the material facts before him of the same nature as justified those later cases, he did not have such information and they were not available to the then counsel for the plaintiff.

In the hands of new and present counsel the following new facts were developed by discovery from the defendant and from other sources. These, are now present before this Court and were obtained by present counsel. These are, Exhibits 2, 2, 4, 5, 6, 7, 9, 10, 11, 12, 14, 15, 16 and 17. Again, no one has shopped around with the same information that was previously available. This is exactly opposite to the further statement of Judge Bicks in his lower court Vassos opinion, "Libelant has presented no controling facts which were not before Judge Edelstein." Again, the plaintiff here has presented controling facts that were not present before Judge McClean.

On a previous discussion of this same matter before your Honor it was our understanding that we were solely concerned with the declination of jurisdiction by Judge McClean, and not with a similar though not the same declination by the State Court. Counsel for the defendant at our last discussion urged to your Honor that the State Court determination was also res judicata of the present case. A word, would therefore be appropriate with respect to this contention.

Again, it is beyond dispute that the State Court declination was on the ground of forum non conveniens, and no more reached the merits than the case dismissed by Judge McClean. If therefore a dismissal on the basis of forum non conveniens by Judge McClean was not res judicata the same principals applicable to res judicata heretofore referred to, would be applicable to that determination. However additional reasons appear why this could not possibly be determinative of the present case.

In the first place whereas as appears from the cases cited in our main brief in this application a Federal court may not decline jurisdiction of a properly pleaded Jones Act case, such is not the rule with respect to a Jones Act case brought in the State court. Whereas the jurisdiction of the Federal court is mandatory, in a proper Jones Act case, in the State court it is only discretionary. Douglas v. New Haven R. Co., 279 U.S. 577, 383. The difference between the two, and the fact that the declination of jurisdiction in a State court will not result in the deprivation to the plaintiff of the mandatory jurisdiction of the Jones Act in a Federal Court is spelled out in the case of O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 193 F.2d 348, 353. Wherein the Court stated in language as applicable to a seaman's case under the Jones Act as it was there to a railroad worker as follows:

> "[2] It is plain, of course, that Congress conferred jurisdiction both upon the Federal and State courts to entertain suits for the vindication of rights established by the Federal Act, but it is also plain from the authorities cited and discussed that Congress did not by use of the word "concurrent" make the jurisdiction of either dependents upon the other. The jurisdiction of the Federal courts is mandatory in the sense that such a court is without discretion to disclaim it in a case where a plaintiff has brought himself within the term of the Federal Act. On the other hand, the juris-

diction of a State court may be embraced or rejected, it is permissibe in nature, depending upon the law of the State, providing, of course, that such law rests upon a non-discriminatory basis. Defendants contention, if accepted, would produce the incongrous result that a State by closing the doors of its courts to an action brought under the Federal Act could ipso facto, also close the doors of a Federal court to such an action."

In the same case, the Court making exactly the same distinction as is now being made, stated (p. 352):

"Defendant relies upon diversity cases, typical of which is the decision of this court in Trust Co. of Chicago v. Pennsylvania R. Co., supra [183 F.2d 643], heretofore discussed, wherein the right asserted is granted or denied by the State. In such cases a Federal court is bound by State law; it is 'in effect, only another court of the State * * *" Angel v. Bullington, 330 U.S. 183, 192, 67 S.Ct. 657, 91 L.Ed. 832; Woods v. Interstate Realty Co., 337 U.S. 535, 538, 69 S.Ct. 1235, 93 L.Ed. 1524. But it is different where the action, as in the instant case, is predicated upon a Federal right. As stated in Angel v. Bullington, 330 U.S. at page 192, 67 S.Ct. at page 662, 91 L.Ed. 832; "Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State."

Of interest, though not of the same importance that it was when a similar occurrence occurred in the Federal court, while the Garis case was pending in the State court the judicial attitude and express judicial law made by the Court of Appeals of that State, also changed in the case of Silver v. Great American Insurance Company with respect

to the law of forum non conveniens. Whereas previously the law had been that certain cases were beyond the ken of forum non conveniens, now, in the Silver case, the court held that the doctrine was to be "flexibly applied" and declined jurisdiction in a case where the plaintiff was a resident of the State of New York. Silver v. Great American Insurance Company, 328 N.Y.S.2d 398, 403.

In short, the present case constitutes no invasion of either the decision of Judge McClean nor of the State court. In both cases, remedies in the respective courts were exhausted, before this present case was instituted. Through no fault of a plaintiff, who has been physically ruined for life, and to whom redress has been granted by Congress as a matter of public policy of the United States, he has never had one fair chance at the merits.

Justice requires that the plaintiff should not be denied the one day in court on the merits that a litigant is normally entitled to. If there be any doubt with respect to the matter, and certainly the defendants' claim is a doubtful one at best at this point, the defendant should be permitted to plead its contention as a defense, as res judicata normally is required to be pleaded.

Respectfully,

LEBOVICI & SAFIR
Attorneys for Plaintiff

By s/ Herbert Lebovici
A Member of the Firm

HL/am

cc: Dougherty, Ryan, Mahoney
Pellegrino & Giuffra, Esqs.
Attorneys for Defendant

LAW OFFICES
LEBOVICI AND SAFIR

November 7, 1975

Judge Thomas P. Griesa
United States Courthouse
Foley Square
New York, N.Y.

Re: Garis v. Compania Maritima San Basilio, S.A.
Index No. 74 Civ. 5527 (TPG)

Honorable Sir:

It is only our belief, that you are aware of depth and sincerity of our feeling that dismissal of the plaintiff's complaint at this time could result in a fearful miscarriage of justice, that permits us to burden you with the following two further considerations, that are raised by the plaintiff's papers in opposition to the pending motion.

These are: 1. That our papers prove without contradiction that a Greek court will not entertain the cause of action granted by Congress (the Jones Act) in the public interest of the United States; proof thereof was not available at the time of the pendency of this matter before Judge McClean;

2. That the law of this Circuit forbids the dismissal of this action wherein, the same relief could not originally have been sought in Greece.

Entirely apart from our showing that our present claim rests upon a showing of law different from its status when the matter was tried before Judge McClean, as well as the showing of other new and additional connecting factors requiring the application of the Jones Act, is the proof by Greek decisions not occurring until August of 1973 and thereafter, that a Greek Court would not entertain the

plaintiff's claim pursuant to United States law. Judge McClean's decision in 1966 could not have anticipated this showing which could not have been made prior to August of 1973.

Thus, in the light of the new proof, the within is an action which otherwise is properly (and indeed, according to the cases cited elsewhere mandatorily) before this Court and is a case which could not, in the first instance have been instituted in Greece. Since it could not have been instituted in the first instance as of right in Greece, by a parity of reasoning with the decision of the Supreme Court in Hoffman v. Blaski, 363 U.S. 335, an application pursuant to the doctrine of forum non conveniens cannot possibly lie.

Thus, in the Hoffman case, 363 U.S. 335, the Supreme Court held, at page 342, that where the plaintiff could not have instituted the same claim as of right in the transferee court, an application pursuant to the doctrine of forum non conveniens as reflected by 28 U.S.C.A. 1404(a) would not lie, stating

> "We do not agree.' We do not think the Section 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require, 'where it may not be rebrought, with defendants' consent'. This Court has said in a different context, that Section 1404(a) is 'unambiguous, direct [and] clear,' Ex parte Collett, 337 U.S., at 58, and that 'the unequivocal words of Section 1404(a) and the legislative history . . . establish that Congress indeed meant what it said.' United States v. National City Lines, Inc. 337 US 78, 84, 93 L. 3d 1226, 1230, 59 S.Ct. 955, 959. Like the Seventh Circuit, 260 F2d at 322, we think the dissenting opinion of Judges Hastie and McLaughlin in Paramount Pictures Inc. v. Rodney, 186 F.2d 111 (CA3d Cir) correctly answered this contention."

As appears from this decision of the Supreme Court

the fact that the defendant agrees to be sued in the transferee court is not a reason which permits the doctrine of forum non conveniens to be invoked, where, the case could not have been brought in the transferee court as of right in the first instance.

As noted above proof of the relevant facts to sustain this contention could not have been before Judge McClean at the time of his decision in this matter.

Of course, the defendant here would claim that their application to decline jurisdiction pursuant to the doctrine of forum non conveniens is a common law application of that doctrine as distinguished from an application pursuant to 1404(a). But the Supreme Court and the courts of this Circuit have held that the common law doctrine of forum non conveniens has been modified, supplanted and pre-empted by the language of 1404(a). Thus, the Supreme Court said in Norwood v. Kirkpatrick, 349 U.S. 31, at page 32 stated as follows:

> "When Congress adopted Section 1404(a), it intended to do more than just codify the existing law on forum non conveniens. As this Court said in Ex parte Collett, 337 US 55-61, 93 L. 3d 1207-1211, 69 S Ct 944, 959, 10 ALR2d 921, Congress, in writing Section 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in Section 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification." [Emphasis added.]

Norwood was followed in this Circuit by Collins v. American Automobile Insurance Co., 230 F.2d 416, wherein the Court of Appeals stated at page 418:

"The application of the doctrine of forum non conveniens by Judge Palmieri to dismiss the case was erroneous. The field of that doctrine is entirely occupied by 28 U.S.C. Section 1404(a), enacted in 1948 subsequent to the decision of Gulf Oil Corp. v. Gilbert, supra, 330 U.S. 501, 67 S.Ct. 839 - the case relied upon by the judge. See Norwood v. Kirkpatrick, 349 U.S. 29, 32, 75 S.Ct. 544, 99 L. Ed. 789 (a case decided after the decision herein); ex parte Collett, 337 U.S. 55, 69 S. Ct. 944, 959, 93 L.Ed. 1207, 10 A.L.R.2d 921. If the forum is found to be inconvenient, the remedy now is transfer, not dismissal as formerly."

Indeed, in the case of Heede Inc. v. West India Machinery and Supply Co., 272 F. Supp. 236, Judge Tenney of this District at page 241 stated as follows:

"Forum non conveniens. The common law theory of forum non conveniens has been pre-empted by the statutory promulgation contained in Title 28 U.S.C. Section 1404(a). Norwood v. Kirkpatrick, 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789 (1955). See generally 1 Moore, Federal Practice Paragraph 0.145[5] (2d ed. 1964). No longer can a defendant seek a dismissal of an action on the grounds of common law forum non conveniens and such a party will be limited to the statutory right to transfer an action '[f] or the conveniens of parties and witnesses, in the interest of justice.' 28 U.S.C. Section 1404(a); see Norwood v. Kirkpatrick, supra at 32, 75 S.Ct. 544. Thus, defendant's motion to dismiss the instant action on the grounds of common law forum non conveniens is denied."

Defendant herein would doubtless counter with cases such as DeSairigne v. Gould, 83 F. Supp. 270, aff'd without opinion at 177 F.2d 515 wherein an admiralty action for breach of contract was dismissed in admiralty despite the enactment of 1404(a). This case is, however, immediately distinguishable by reason of the fact that it was not an action wherein mandatory jurisdiction by reason of a properly pleaded complaint and presence of substantial connecting factors was before the court. Per contra it was an action in contract wherein an admiralty court in any event would have had the discretion to decline jurisdiction.

It is relevant to note, as appears again from the latest decisions concerning this subject as examplified by Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 that, as a possibility suggested by the court during argument that the plaintiff might have "some remedy" in Greece, to where the plaintiff would be remitted in the event of dismissal here, "some remedy" is not good enough. The remedy to which a plaintiff must be relegated in the event of a declination of jurisdiction is the same remedy that he is entitled to seek in the United States. Thus, the Supreme Court in Rhoditis, supra, stated at 398 U.S. 310:

> "We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act 'employer'. The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there, are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country." [Emphasis added.]

Indeed, even according to the common law remedy of forum non conveniens as examplified by Gulf Oil v. Gilbert, 330 U.S. 501 in order for the common law doctrine to be applicable there must be two forums in which the same remedy can be sought before the doctrine may be applicable. Clearly, by reason of the Greek law shown in our papers, made by the Greek courts since the decision of Judge McClean, the plaintiff cannot have in Greece the same remedy that he is entitled to pursue here in New York (indeed nowhere else) and by this token it now appears that the doctrine of forum non conveniens cannot be applicable either under the common law application or under 1404(a). This represents a showing of new fact and law that through no fault of the plaintiff could not have been shown to Judge McClean.

Respectfully,

LEBOVICI & SAFIR
Attorneys for Plaintiff

By: s/Herbert Lebovici
HERBERT LEBOVICI

HL/am

cc: Dougherty, Ryan, Mahoney,
Pellegrino & Giuffra, Esqs.
Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

DIMITRIOS GARIS,

Plaintiff,

-against-

COMPANIA MARITIMA SAN BASILIO, S.A.,

Defendant.

- X

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF A MOTION FOR SUMMARY JUDGMENT

STATEMENT

This memorandum is submitted in support of the defendant's motion for summary judgment, on the ground of res judicata. As stated in the Affidavit of Lawrence J. Mahoney, annexed to the Notice of Motion, and in the Statement of Material Facts not in issue, there has been extensive prior litigation involving the same parties and the same cause of action. A similar suit by this plaintiff against this defendant seeking the same remedy, was dismissed by District Court Judge Edward C. McLean for forum non conveniens, in an opinion reported at 361 F. Supp 917. This dismissal was affirmed by the United States Court of Appeals for the Second Circuit on November 28, 1967 in an

opinion reported at 386 F. 2d 155.

A similar action by this plaintiff against this defendant was instituted in the Supreme Court of the State of New York, County of New York on June 10, 1968. This action was dismissed for forum non conveniens by Justice Paul A. Fino in a decision dated October 13, 1971. This dismissal was unanimously upheld by the Appellate Division, First Department, on March 8, 1974, and the plaintiff's motion for leave to appeal to the Court of Appeals of the State of New York was denied on July 14, 1974.

The plaintiff's appeal to the Supreme Court of the United States was dismissed on December 16, 1974 and his petition for certiorari was denied at that time.

POINT I

THE DOCTRINE OF RES JUDICATA REQUIRES THE DISMISSAL OF THIS ACTION.

Every Court before which this plaintiff has brought an action has dismissed the suit on the basis of forum non conveniens. The discretionary jurisdiction of this Court has been declined and this issue is now res judicata. Although the plaintiff is free to pursue his cause of action on the merits in the Courts of Greece, it has already been decided that the United States District Court for the Southern District of New York is not the

proper forum for this suit between aliens.

A similar situation was considered by the Court of Appeals for the Second Circuit. Vassos v. Societa Trans-Oceanica Canopus, S.A., 272 F. 2d 163. That action, by an alien seaman was dismissed because another District Court Judge had previously declined to accept jurisdiction. The Courts have upheld the dismissal both on the ground of the statute of limitations and also for res judicata. The District Court cited Stoll v. Gottlieb, 305 U.S. 165; Angel v. Bullington, 330 U.S. 183.

The doctrine of res judicata is too familiar to require extensive quotations from numerous decisions. A general statement of the position taken by the Courts was contained in the Third Circuit opinion in Bruzewski v. U.S.A., 171 F. 2d 419, cert. den. 33 U.S. 828. Referring to a longshoreman's suit which had been brought first against the operator of a vessel and then against its owner, the Court stated at page 421:

> "This second effort to prove negligence is comprehended by the generally accepted precept that a party who has had a fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time."

Please see also Blonder-Tongue Lab. v. University Foundation, 402 U.S. 313; Catepillar Tractor Co. v. International Harvester Company, 120 F. 2d 82; Hedger

Transportation Corp. v. Ira S. Bushey, 92 F. Supp. 112, Aff'd 186 F. 2d 236.

POINT II

THERE ARE NO NEW DECISIONS TO BE CONSIDERED BY THIS COURT

During a recent discussion before Judge Thomas Griesa, Garis' attorney argued that changes in the law have taken place since this action was originally dismissed, and that there are new factors to be considered. The plaintiff's attorney referred to Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, and Moncada v. Ekberg Steamship Inc. and Lemuria Shipping Corp., 491 F. 2d 470.

As set forth in the Affidavit of Lawrence J. Mahoney attached to the moving papers, these decisions have been relied upon by the plaintiff throughout this litigation. Attached as Exhibits to the moving papers are copies of the appellant's Briefs which were submitted to the Appellate Division, First Department and finally to the Supreme Court of the United States. Both Briefs demonstrate that the Rhoditis and Moncada decisions had been relied upon by the plaintiff and that their holdings had been cited in support of the plaintiff's argument. It is a matter of record that this argument had been rejected by the Courts, which upheld the dismissal.

CONCLUSION

BECAUSE OF THE INDISPUTABLE FACT THAT THE PLAINTIFF'S PRIOR ACTION AGAINST THE SAME DEFENDANT HAS BEEN DISMISSED, SUMMARY JUDGMENT SHOULD BE GRANTED AND THIS SUIT SHOULD BE DISMISSED ON THE GROUND OF RES JUDICATA.

Respectfully submitted,

DOUGHERTY, RYAN, MAHONEY, PELLEGRINO
& GIUFFRA
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576 Fifth Avenue
New York, New York 10036

LAWRENCE J. MAHONEY,
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

DIMITRIOS GARIS,

Plaintiff,

v.

74 Civ. 5527

COMPANIA MARITIMA SAN BASILIO, S.A.,

OPINION

Defendant.

- X

APPEARANCES:

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575 Fifth Avenue
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By: Lawrence J. Mahoney, Esq.

GRIESA, J.

This is an action by a Greek seaman for damages for personal injuries sustained on board defendant's vessel while on the high seas. The vessel is of Greek registry and flies the Greek flag. Defendant shipowner, a Panamanian corporation, moves to dismiss this action on the ground of res judicata. The motion is granted.

The claim made in this action has been the subject of two prior lawsuits. The first was brought in this court in 1966 (66 Ad. 35). Judge McLean dismissed this action, declining jurisdiction on the grounds that there were not enough relevant contacts with the United States and that the action could more conveniently be tried in Greece. The action was dismissed without prejudice to the institution of an action in Greece. 261 F. Supp. 917 (S.D.N.Y. 1966), aff'd, 386 F.2d 155 (2d Cir. 1967).

Defendant agreed to submit itself to the jurisdiction of the Greek courts. Plaintiff brought no action in Greece, but instead commenced an action in New York Supreme Court in 1968. This action was dismissed for forum non conveniens in 1971 in an unreported opinion. This dismissal was affirmed by the Appellate Division, 44 App. Div. 2d 655, 353 N.Y.S.2d 711 (1st Dept. 1974), and leave to appeal to the Court of Appeals was denied. Plaintiff applied to the United States Supreme Court for certiorari, which was denied on December 16, 1974. 419 U.S. 1065.

Plaintiff reinstituted suit in this court on December 17, 1974 on the same claim sued on in the earlier actions.

Defendant, on the present motion, asserts that Judge McLean's decision, as affirmed by the Court of Appeals, is res judicata on the question of whether the United States District Court for the Southern District of New York is an appropriate forum for the

prosecution of plaintiff's claim against defendant. In opposition to the motion, plaintiff contends that Judge McLean's declination of jurisdiction is not res judicata, and that, in any event, the law upon which Judge McLean relied was changed by the Supreme Court and the Second Circuit in later decisions, with particular reference to Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970).

Defendant is clearly correct that the action should be dismissed on the ground of res judicata. The principles of res judicata apply to questions of jurisdiction. American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932); Ripperger v. A. C. Allyn & Co., 113 F. 2d 332 (2d Cir.), cert. denied, 311 U.S. 695 (1940); 1B J. Moore, Federal Practice Paragraph 0.405(5), at 655-63, (2d Ed. 1974). Where a court, within its discretion, declines to take jurisdiction in a case, that decision is res judicata in that district on the propriety of the forum. Vassos v. Societa Trans-Oceanica Canopus, S.A., 272 F.2d 182 (2d Cir. 1959). A dismissal on

jurisdictional grounds of forum non conveniens is of course not res judicata on the merits of a claim prosecuted in a proper forum. Koziol v. The Fylgia, 230 F.2d 651 (2d Cir.), cert. denied, 352 U.S. 827 (1956).

I reject plaintiff's contention that there is any avoidance of res judicata on the theory that the relevant law was "changed" by later decisions. See Ripperger v. A. C. Allyn & Co., supra. Moreover, I fail to see how any of the later decisions referred to would have changed the result reached by Judge McLean.

The action is dismissed.

Dated: New York, New York
March 12, 1976

s/Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

DIMITRIOS GARIS,

Plaintiff,

74 Civ. 5527

NOTICE OF APPEAL

-against-

COMPANIA MARITIMA SAN BASILIO, S.A.,

Defendant.

- X

SIRS:

PLEASE TAKE NOTICE that the plaintiff hereby appeals from the decision and order of Judge THOMAS P. GRIESA dated March 12, 1976, dismissing the within action and from each and every part of such decision, order and judgment.

Dated: New York, New York
April 9, 1976

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